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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

YI QIANG YANG,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BRETT DIGNAM
SARAH F. RUSSELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Thomas V. Massucci
401 Broadway, Suite 908
New York, NY 10013
(212) 334-2280

Counsel for Petitioner

QUESTION PRESENTED

Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1101(a)(42), provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political opinion" and is therefore eligible for asylum in the United States. The Board of Immigration Appeals has held that legally registered spouses of persons subjected to these procedures qualify for asylum under this provision. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997) (en banc). The question presented is:

Whether married individuals whose spouses suffered forced abortions or sterilizations imposed by China's coercive population control policy, and who were prevented from registering their marriages due to minimum age requirements imposed by the same policy, are "refugees" eligible for asylum.

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JURISDICTION

The judgment of the court of appeals was originally entered on July 12, 2007. The court, on its own motion, granted rehearing and entered judgment on August 8, 2007. On October 30, 2007, Justice Thomas granted an extension within which to file a petition for writ of certiorari to and including December 6, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Immigration and Nationality Act ("INA") states:

> The term "refugee" means (A) any person who is * * * unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

8 U.S.C. § 1101(a)(42)(A). Section 601 of the Illegal Immigration Reform and Immigrant Responsibility

Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 amended this provision to include:

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42)(A).

STATEMENT

Under China's coercive population control policy, married couples are permitted to have only one child; unmarried individuals are not allowed to have children. To further ensure limited population growth, the Chinese government imposes severe age restrictions on state-recognized marriage and makes use of compelled abortion and sterilization.

Congress enacted Section 601 of IIRIRA in response to this policy. Under Section 601, victims of forced abortion and sterilization are eligible for asylum in the United States. The Board of Immigration Appeals ("BIA") has interpreted the statute to mean that when one spouse is forced to abort an unborn child or to undergo a sterilization procedure, both spouses have been persecuted within the meaning of Section 601.

The question presented in this case is whether spouses who have entered into so-called "traditional" marriages, but have been unable to formally register their marriages because of China's age restrictions on marriages, are automatically eligible for asylum under Section 601. The Seventh and the Ninth Circuits have held that traditionally married spouses should benefit from the rule of automatic eligibility. The Eleventh Circuit here found that they should not, even if legally registered spouses get the benefit of the rule. And in contrast to these two approaches, the Second Circuit would deny per se eligibility to *all* spouses. Because this is an issue of enormous practical importance – and because the decision below creates an arbitrary distinction that cannot be reconciled with the congressional intent – further review is warranted. Alternatively, because the Attorney General recently commenced a proceeding that will reconsider administrative policy in this area, the Court should hold this petition pending disposition of that proceeding.

A. China's Population Control Policy

This case arises in the context of China's coercive population control policy. China employs this population control regime – commonly called the "one-couple, one-child" policy – to slow population growth. The policy forbids families from having multiple children and prevents couples from having children before they reach the legal age for marriage in China. U.S. Dep't of State, *Country Reports on Human Rights Practices: China 2006* § 1(f) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm [hereinafter *Country Report*]; Cong.-Exec. Comm'n on China, *2007 Annual Report* 108-11

(2007); Amnesty Int'l, *Report 2007: The State of the World's Human Rights* 85-86 (2007).

To punish violations of the population control policy, the government aborts fetuses and frequently sterilizes those who violate the policy. *Country Report*, *supra*, § 1(f). Indeed, at least seven Chinese provinces legally require "termination" of unauthorized pregnancies, and another ten provinces require unspecified "remedial measures." *Ibid.* In practice, coerced abortions and sterilizations occur in every region and province of China. Cong.-Exec. Comm'n, *supra*, at 111.

These human rights violations are common, extensive, and contemporary. For example, the 2006 State Department Country Report profiles the mass abortion and sterilization that took place in 2005 in the Linyi, Shandong Province. *Country Report*, *supra*, § 1(f); Cong.-Exec. Comm'n, *supra*, at 110. According to the State Department, reliable international sources believe that local Chinese officials detained approximately 130,000 persons and forced many of them to submit to abortion or sterilization. *Country Report*, *supra*, § 1(f). At least 7000 persons were forcibly sterilized, and late-term abortions were reported. *Ibid.* Similarly, in the spring of 2007, officials in Bobai County, Guangxi Zhuang Autonomous Region, "initiated a wide-scale campaign" to control birthrates, which included forced abortions and sterilizations. Congr.-Exec. Comm'n, *supra*, at 110.

China's population control policy also imposes severe restrictions on state-recognized marriage. To register a marriage, the national policy dictates that a man must be twenty-two years of age and a woman must be twenty, and many localities impose higher minimum marriage ages. See Marriage Law (prom-

ulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001) art. 8, translated in LawInfoChina (find at http://www.lawinfochina.com) (P.R.C.).

Because individuals often marry at an earlier age in Chinese culture, couples frequently enter marriage relationships without official state sanction. John W. Engel, *Marriage in the People's Republic of China*, 46 J. of Family & Marriage 955, 958-59 (1984). Courts in the United States generally refer to these Chinese marriages as "traditional marriages."

Traditional marriage ceremonies are an important aspect of Chinese culture and have been performed for 2500 years. *Ibid.* Indeed, in some regions of China they make up a very substantial majority of all marriages. See *infra*, 24-25. But because traditionally married spouses are unable to register their marriages with the government, the state treats such couples who have children as violators of the population control policy. Accordingly, such couples are often subjected to forced abortions or sterilizations. See, *e.g.*, *Ma* v. *Ashcroft*, 361 F.3d 553, 555-56 (9th Cir. 2004); *Zheng* v. *Ashcroft*, 397 F.3d 1139 (9th Cir. 2005); *Lin Chen* v. *U.S. Dep't of Justice*, 241 F. App'x 733 (2d Cir. 2007).

B. Statutory and Executive Branch Responses to China's Population Control Policy

Since China implemented its population control policy, Chinese nationals affected by the policy have sought asylum in the United States. Asylum seekers have claimed that forced abortion and sterilization violate their political rights, and therefore that they are victims of political persecution within the mean-

ing of 8 U.S.C. § 1101(a)(42)(A). If deemed victims of persecution, they are refugees eligible for asylum in the United States under the INA. *Ibid.*

In 1989, the BIA rejected this argument and held that individuals subject to forced abortion and sterilization are persecuted only if "the governmental action arises for a reason other than general population control." *Matter of Chang*, 20 I. & N. Dec. 38, 44-45 (BIA 1989). The BIA found that a generally applicable policy of forced abortion and sterilization did not constitute persecution for purposes of the INA. *Ibid.*

In response to the BIA's ruling, both Congress and the executive branch took steps to extend asylum eligibility to victims of forced abortion or sterilization, including the spouses of persons directly subject to these procedures. Swiftly responding to *Chang*, Congress passed the Emergency Chinese Immigration Relief Act ("ECIR") in 1989, providing in pertinent part that:

> [T]he Attorney General shall promulgate regulations to * * * provide that an applicant * * * shall be considered to have established a well-founded fear of persecution based on political opinion if returned to China if the applicant establishes that (1) the applicant (*or applicant's spouse*) has refused to abort a pregnancy or resisted sterilization in violation of China's family planning policy directives * * *.

H.R. Res. 2712, 101st Cong. § 3(b) (1989) (emphasis added). Although President George H.W. Bush vetoed this bill, he did so because he believed that its aim could be accomplished more effectively through action by the Executive Branch. Memorandum of

Disapproval of H.R. 2712, H.R. Doc. No. 101-132, at 2 (1990).

Attorney General Thornburgh then issued an interim regulation to implement the President's directive. Like H.R. 2712, the regulation provided that forced abortion and sterilization could be grounds for asylum as persecution on account of political opinion, and protected "[a]n applicant who establishes that the applicant (*or applicant's spouse*) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy." Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2805 (proposed Jan. 29, 1990) (emphasis added). See also Policy Implementation with Respect to Nationals of the People's Republic of China, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990); Memorandum from the Office of General Counsel of INS 1 (Nov. 7, 1991), reprinted in 69 Interpreter Releases app. I 311, 311 (1991). Subsequently, Attorney General Barr signed a rule that provided asylum eligibility to an applicant "and the applicant's spouse, if also an applicant." *Zhang* v. *Slattery*, 55 F.3d 732, 740 (2d Cir. 1995) (citing Att'y Gen. Order No. 1659-93).

After this executive policy ended during the Clinton Administration, Congress passed Section 601 of IIRIRA in 1996. The legislation amended the INA's definition of refugee to expressly address victims of forced abortion and sterilization. Section 601 provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opin-

ion," and accordingly is a "refugee" eligible for asylum under the INA. 8 U.S.C. § 1101(a)(42)(A).

Following the enactment of the statute, the BIA concluded that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse," so that spouses are deemed eligible for asylum. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997) (en banc). In that case, INS (now the Department of Homeland Security, "DHS") stated its position "that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him." *Id.* at 918 (citing Memorandum from INS, at 4 (Oct. 21, 1996)).

In 2006, the BIA again considered this statutory provision in a case presenting the question whether unmarried partners – like boyfriends or fiancées – of women forced to undergo abortions may also qualify for asylum under Section 601. See *Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006). In *S-L-L-*, DHS changed its position and requested that the BIA revisit the rule issued in *C-Y-Z-*. *Id.* at 3-4. The BIA declined to do so, reaffirming *C-Y-Z-* and stating that spouses are eligible for asylum based on their partner's forced abortion or sterilization. *Id.* at 7. The BIA limited this holding to spouses, however, and stated that unmarried partners were not eligible for relief.

C. Proceedings Below

1. Petitioner Yi Quang Yang, a native and citizen of China, entered into a traditional marriage with Jian Hui Ling on July 15, 2000. App., *infra*, 2a. They conducted a marriage ceremony that was at-

tended by friends and family. *Ibid.* The couple exchanged rings to symbolize their marriage. *Ibid.* The couple did not register their marriage because, under Chinese law, they were below the legal age (Yang was twenty and Ling was seventeen). *Ibid.* Ling became pregnant soon after the couple married. When the couple discovered that Ling was pregnant, they hid at a relative's house to avoid detection by state officials. *Ibid.*

When Ling was eight months pregnant, government officers learned of the pregnancy and took Ling to a hospital. There, population control officials forcibly aborted Ling's pregnancy; the fetus was placed in a bag and disposed of in front of Ling. *Id.* at 4a.

When Yang discovered that his wife had been taken into custody by the family planning officials, he went to the hospital in an effort to free her. *Id.* at 2a-3a. After a vocal confrontation with the officials, they began to beat him. *Id.* at 3a. Though Yang managed to escape, the following day he was subpoenaed by the local security office. *Ibid.* Rather than surrender, he fled to the United States and applied for asylum. *Ibid.*

2. At the asylum hearing, Yang provided evidence of his marriage to Jian Hui Ling in a traditional ceremony, and of the forced abortion. The immigration judge nevertheless denied Yang's petition because he "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." App., *infra*, 5a, 53a. The BIA dismissed Yang's appeal in an unpublished opinion, agreeing that "an applicant must have entered into a legally recognizable marriage" and "[u]nderage couples living in de

facto unregistered relationships are not recognized as married by the Chinese government." *Id.* at 36a.

3. Yang appealed the BIA's ruling to the Eleventh Circuit. App., *infra*, 1a-17a. The court noted that "two circuits [the Seventh and the Ninth] have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the population control laws, then the couple should be considered as married for the purposes of claiming asylum under the *C-Y-Z-* decision." *Id.* at 13a. But the Eleventh Circuit rejected the holdings of those courts, concluding that it was reasonable for the BIA to deny protection to traditionally married fathers because of the "sanctity and long-term commitment" that legal marriage entails. *Id.* at 12a.[1]

D. **Attorney General Proceeding.**

In an immigration proceeding commenced after the Eleventh Circuit's decision in this case, the Attorney General currently is considering a matter involving issues related to those presented in this petition. Jianhua Shi sought asylum under Section 601

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[1] The Eleventh Circuit issued its opinion on July 12, 2007. App., *infra*, 18a-34a. On its own motion, the court granted rehearing and substituted a new opinion on August 8, 2007. *Id.* at 1a-17a. The amended opinion includes a brief discussion of the Second Circuit's opinion in *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), which was decided on July 16, 2007. The Eleventh Circuit eliminated from its original opinion dicta stating that legally recognized spouses are per se eligible for asylum under Section 601. Compare App., *infra*, 11a-12a with *id.*, at 28a-29a. As discussed, *infra* at 15-16, the Second Circuit's opinion deepens the division among the circuits.

on the grounds that his spouse was subject to a forced sterilization. After the BIA denied his petition (*Matter of Jianzhong Shi*, A95 476 611 (BIA 2006)), Shi appealed to the Third Circuit.

On July 27, 2007, the Third Circuit issued a sua sponte order scheduling an en banc hearing to address the question of "whether spouses of those victimized by China's coerceive [sic] population control policy are entitled to automatic eligibility for asylum under the Immigration and Nationality Act." *Jianzhong Shi* v. *U.S. Att'y Gen.*, No. 06-1952 (3d Cir. July 27, 2007) (order directing parties to brief issue before en banc court). Following entry of this order, the Attorney General withdrew the BIA decision in *Shi* pursuant to 8 C.F.R. § 1003.1(h) and directed DHS and Shi to brief the question posed by the Third Circuit in the Office of Legal Counsel. *Jianzhong Shi* v. *U.S. Att'y Gen.*, No. 06-1952 (3d Cir. Oct. 24, 2007) (order remanding case). On October 24, 2007, the Third Circuit remanded the matter to allow the Attorney General to review the BIA opinion. *Ibid.*

REASONS FOR GRANTING THE PETITION

In the instant case, the Eleventh Circuit held that spouses who are married in traditional ceremonies, but are unable to register their marriages, do not qualify for asylum in the United States. App., *infra*, at 12a. This holding is in direct conflict with decisions of the Seventh and the Ninth Circuits, which have held that asylum extends to the traditionally married spouses of persons subjected to forced abortion and sterilization. The Second Circuit has taken yet another approach, holding that *no* spouses – whether registered or not – benefit from Section 601's rule of automatic asylum eligibility. *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 305 (2d

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Cir. 2007) (en banc). This issue plainly is a recurring one of great practical importance as to which uniform treatment across the circuits is essential.

As we have noted, following the decision in *Lin*, the Attorney General chose to initiate a review and directed the BIA to refer its decision in *Matter of Jianzhong Shi*, A95 476 611 (BIA 2006), which was before the Third Circuit at the time. The question in that proceeding is whether any spouses – registered or traditional – are entitled to asylum under U.S. immigration law. Notwithstanding the pendency of that proceeding, however, this Court should grant review in this case to restore uniformity in the application of the law on the question presented. A conflict almost certainly will persist among the circuits regardless of the Attorney General's decision because courts of appeals on both sides of the debate, relying on the plain language of the statute and what they regard as the manifest congressional policy, already have rejected an agency interpretation of Section 601. Alternatively, if it does not grant review, the Court should hold the petition in this case pending a decision by the Attorney General; to do otherwise would result in a manifestly inequitable result, as it would mean that an accident of timing would deny petitioner either the possibility of review in this Court or the opportunity to benefit from a favorable ruling by the Attorney General.

A. The Courts Of Appeals Are Divided Over Whether Traditionally Married Spouses Of Persons Subjected To Forced Abortion Or Sterilization Are Eligible For Asylum.

In applying Section 601 of IIRIRA, the courts of appeals have disagreed as to whether a traditionally

married spouse is deemed eligible for asylum relief. Traditionally married spouses *are* eligible for asylum in two courts of appeals. But they are *not* eligible for asylum in two other circuits. One additional circuit also suggested approval for the rule denying asylum to claimants like the petitioner.

1. The Seventh and Ninth Circuits have held that traditionally married spouses are eligible for asylum under Section 601. The Seventh Circuit has held that "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum" when his wife suffers a forced abortion or sterilization. *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). See also *Zhu* v. *Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006) (same); *Chang Sheng Lu* v. *Gonzales*, 199 F. App'x 552, 554 (7th 2006) (same).

Likewise, the Ninth Circuit has interpreted Section 601 as applying to traditionally married spouses. *Ma* v. *Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004). The court held "that the protections of [Section 601] apply to husbands whose marriages would be legally recognized, but for China's coercive population control policies, and not only to husbands whose marriages are recognized by Chinese authorities." *Id.* at 561. See also *Zheng* v. *Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005) (same); *Zi Zhi Tang* v. *Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007) (same).[2]

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[2] The Third, Fourth, Fifth, Sixth, and Eighth Circuits have accepted the BIA's determination that spouses of persons subjected to forced abortion and sterilization qualify for asylum,

2. The Second and Eleventh Circuits disagree. The Eleventh Circuit below "recognize[d] that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the population control laws, then the couple should be considered married for the purposes of claiming asylum under the *C-Y-Z* decision." App., *infra*, 13a. Nonetheless, the court held that "[b]ecause Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under [Section 601]." *Ibid.*[3]

The Eleventh Circuit sought to avoid the contrary holdings of *Ma* and *Zhang* on the theory that those decisions "were rendered before the BIA's

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but have not ruled on the extension of per se asylum to traditionally married spouses. *Sun Wen Chen* v. *U.S. Att'y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007); *Lin-Jian* v. *Gonzales*, 489 F.3d 182 (4th Cir. 2007); *Li* v. *Ashcroft*, 82 F. App'x. 357, 358 (5th Cir. 2003) (per curiam); *Huang* v. *Ashcroft*, 113 F. App'x. 695, 698-99 (6th Cir. 2004); *Hong Zhang Cao* v. *Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006). But see *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 228-31 (3d Cir. 2004) (Alito, J.) (suggesting that Section 601 asylum eligibility is limited to spouses whose marriages are legally recognized).

[3] The Third Circuit also has expressed approval of the denial of asylum to claimants like the petitioner. *Cai Luan Chen*, 381 F.3d at 228-31 (Alito, J.). Although the case did not involve a traditional marriage, the court denied asylum for the "[petitioner] and other unmarried persons who *wanted* and indeed *tried* to get married but were prevented from doing so by a law that is an integral part of a program of persecution." *Id.* at 230-31 (emphasis in original). The Third Circuit acknowledged that its "reasoning may appear to be in tension with that of *Ma* v. *Ashcroft*." *Id.* at 231.

S-L-L- decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little persuasive value now." App, *infra*., 13a. But this argument is wrong. *S-L-L-* addressed only the distinction between legally recognized husbands and fathers who are not married, like boyfriends and fiancées. *Matter of S-L-L-*, 24 I. & N. Dec. 1, 8 (BIA 2006) (holding that marriage is the "linchpin" to the *C-Y-Z-* grant of asylum to spouses). The BIA stated that the "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *Id*. at 9. Under this rationale, as described, *infra* at 23-25, traditionally married spouses are indistinguishable from couples whose marriages are legally recognized. The BIA was not presented with, and consequently did not consider, a case involving traditional marriage.

In any event, and regardless of the BIA's analysis, both the Seventh and Ninth Circuits have held that traditionally married spouses are eligible for asylum under Section 601 in cases decided *after S-L-L-*. See, *e.g.*, *Zi Zhi Tang* v. *Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007); *Chang Sheng Lu* v. *Gonzales*, 199 F. App'x 552, 554 (7th Cir. 2006). The circuits remain divided following *S-L-L-*.

The Second Circuit also disagrees with the Seventh and Ninth Circuits, but on different grounds: it withholds the rule of automatic asylum eligibility for *all* spouses – registered and traditionally married. In *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007), cert filed *sub. nom Zen Hua Dong* v. *Mukasey*, No. 07-639 (Nov. 13, 2007), the court concluded that "the BIA erred in its interpretation of 8 U.S.C. § 1101(a)(42) [in *C-Y-Z-*] by failing to

acknowledge language in [Section] 601(a), viewed in the context of the statutory scheme governing entitlement to asylum, that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners of individuals expressly [Section] 601(a) protects." Consequently, the court denied asylum to the petitioners before them, who were all boyfriends or fiancées. *Id.* at 314.

Although the petitioners in *Shi Liang Lin* were unmarried partners, the Second Circuit has since applied its rule to deny asylum to traditionally married spouses. See, *e.g.*, *Cheng Yang Lin* v. *Board of Immigration Appeals*, 231 Fed. Appx. 74 (2d Cir. Jul 19, 2007); *Lin Chen* v. *U.S. Dep't of Justice*, 241 F. App'x 733, 733 (2nd Cir. 2007).

3. The conflict and confusion on this issue are persistent and ripe for this Court's review. In addition to the court below, several circuits have recognized the disagreements among the courts of appeals. See, *e.g.*, *Shi Liang Lin*, 494 F.3d at 300 n.4 ("The circuits are already split over whether [Section] 601(a) provides protection for individuals who marry in traditional ceremonies not recognized by their government and later seek asylum based on the forced abortion or sterilization of their 'common law spouse.'"); *id.* at 334 (Calabresi, J., concurring and dissenting) (arguing the Second Circuit "is in direct conflict with every other circuit, the BIA, and ten years of rulings"); *Chen* v. *Gonzales*, 418 F.3d 110, 111 & n.2 (1st Cir. 2005) (recognizing the "active circuit split on this question of law").

4. The confusion about the governing rule, and the meaning of the statutory language, is highlighted by the differing positions taken by the government itself. On some occasions, the government has ar-

gued that traditionally married spouses are eligible for asylum. See, *e.g.*, U.S. Br. 17, *Zhang* v. *Gonzales*, 434 F.3d 993 (7th Cir. 2006) (containing argument heading "Zhang Would Establish Past Persecution If He Established That He Was Married in a Traditional Chinese Ceremony and Chinese Authorities Forced His Wife To Have an Abortion"). In other cases, the Department of Justice has argued against according such applicants asylum. See, *e.g.*, U.S. Br. 21, *Ma* v. *Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (arguing that "the Board's conclusion that *C-Y-Z-* should not be extended to cover legally unmarried partners, must be affirmed" and thus Ma's traditional marriage should not fall under per se asylum eligibility); *Shi Liang Lin*, 494 F.3d at 300 (describing government's position as same). In contrast to the DOJ position, the Department of Homeland Security has argued in favor of the Second Circuit approach that *no* spouses are eligible for asylum. *Id.* at 310 n.11 (describing DHS brief). An issue that has spawned such confusion and uncertainty warrants this Court's attention.

B. This Case Presents An Issue Of Profound National Importance.

This case raises a significant question of national importance that warrants review by this Court. The circuit split at issue in this case creates intolerable inconsistency in the application of national immigration law, with significant consequences. If Yang's case had been decided in the Seventh or Ninth Circuits, he would have been deemed eligible for asylum under Section 601. The fate of traditionally married spouses thus turns on nothing more where their case is heard.

This inconsistency both causes substantial injustice for asylum applicants like Yang and creates perverse incentives for future asylum applicants. If the courts remain divided, an asylum applicant will have an incentive to strategically choose a point of entry to ensure that his or her case is heard in a circuit where he or she may be eligible for asylum. Moreover, the widespread confusion over the application of immigration law in this context will likely burden the courts with further appeals of this type. The Court should resolve this conflict now.

The circumstances at issue in this case arise frequently. As originally enacted, IIRIRA limited the annual number of visas that were available for applicants under Section 601 to 1000. Pub. L. No. 104-208, § 601(b), 110 Stat. 3009-689. Between 1998 and 2003, the annual number of applicants who were granted relief under this provision vastly exceeded 1000; by 2004 – within eight years of the passage of IIRIRA – more than 9000 applicants were on the waiting list. Cong. Research Serv., *U.S. Immigration Policy on Asylum Seekers* 16-17 (2006). See also News Release, Executive Office for Immigration Review, *EOIR Notifies Persons Eligible for Full Asylum Benefits for Fiscal Year 2004 Based on Coercive Population Control Policies* (Dec. 16, 2004), *available at* http://www.usdoj.gov/eoir/press/04/CPCAsylumReleaseDec04.htm.

The Real ID Act of 2005 eliminated the annual cap on the number of annual visas available under Section 601. Pub. L. No. 109-13, Div. B, tit. I, § 101(g)(2), 119 Stat. 231, 305-06 (2005). In 2006, U.S. immigration courts received nearly 9000 claims from Chinese asylum seekers, and more than 4000 Chinese applicants appealed IJ decisions. U.S. Dep't of

Justice Executive Office for Immigration Review, *FY 2006 Statistical Year Book* (February 2007). A substantial number of these claims relate to China's coercive population control policies. And as discussed, *infra* at 24-25, a significant portion of couples in China are traditionally married. The lower courts would greatly benefit from guidance from this Court regarding application of Section 601.

C. The Eleventh Circuit Erred By Holding That Traditionally Married Spouses Are Not Eligible For Asylum Under Section 601.

The need for review is especially acute because the Eleventh Circuit erred in holding that traditionally married spouses are not automatically eligible for asylum. *Spouses* plainly are eligible for asylum under the immigration laws. And *traditionally married spouses* are victimized by coercive population control policies in precisely the same way as registered spouses.

1. The spouses of persons subjected to a forced abortion or sterilization are eligible for asylum under immigration law.

To begin with, Congress plainly intended to provide per se protection to spouses when it enacted Section 601, which provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42). Significantly, the provision utilizes the gender-neutral word "person," indicating that the provision could apply to either member of a couple. This would have been a very odd formulation had Congress intended to provide asylum protection

only to women who have suffered forced abortions.[4] In fact, the sponsors of Section 601, Congressman Chris Smith and former Congressman Henry Hyde, submitted a brief to the Attorney General in the *Shi* proceeding making this very point, stating that "Section 601 of IIRIRA was intended to provide asylum to all victims – including spouses – of forced abortion and sterilization." Amicus Br. of Rep. Chris Smith and Former Rep. Henry Hyde, at 12, *Matter of Jianzhong Shi*, A 95 476 611 (filed Nov. 2, 2007) (pending before the Attorney General).

Congress confirmed that interpretation of the statute in the debate surrounding its enactment, which is replete with references to "couples" and "men and women" affected by China's coercive population control policies. H.R. Rep. No. 104-469(I), at 174 (1996) (stating that Section 601 was intended to provide relief for "[c]ouples" who were persecuted because of "'unauthorized' * * * pregnancies."). For instance, Representative Smith criticized the lack of asylum eligibility for couples and proposed a "safe haven" for "women and men who were fleeing from forced abortion," because spouses are affected by coerced abortion or sterilization. *Hearing on Coercive*

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[4] The omission of the word "spouse" from Section 601 has no significance. Section 601's legislative predecessor, the ECIR, used a somewhat different formulation, referring to circumstances where "the applicant (or applicant's spouse) has refused to abort a pregnancy." H.R. Res. 2712, 101st Cong. § 3(b) (1989). Section 601 broadened this language, dropping the reference to "the applicant" and instead referring to "a person who has been forced to abort a pregnancy." Use of the more general term "a person" made reference to spouses unnecessary; indeed, language identifying "a person or a person's spouse forced to abort a pregnancy" would have been nonsensical.

Population Control in China Before the Subcomm. On Int'l Operations & Human Rights of the H. Comm. On Int'l Relations, at 28, 104th Cong. 40 (1995) (statement of Rep. Christopher Smith). Representative Goodling protested the plight of "a group of Chinese men" held in a local jail for over 1000 days after fleeing China's coercive population control policies. 142 Cong. Rec. H2084-03, H2087 (1996) (statement of Rep. Goodling). It would be an odd result indeed if Section 601 did not provide relief to the very victims whose circumstances motivated enactment of the legislation.

Furthermore, it is absolutely clear that Congress meant to endorse the policy of the George H.W. Bush administration on this point, which explicitly granted such protection to both spouses victimized by coercive population control policies. For example, Representative Smith explained that the IIRIRA "reinstates the Reagan-Bush policy" of providing asylum to all victims of forced abortion. 142 Cong. Rec. H4151-04, H4153 (1996) (statement of Rep. Smith). See also *Hearing on Coercive Population Control*, *supra*, at 28; 142 Cong. Rec. H2084-03, H2087 (1996) (statement of Rep. Goodling); 142 Cong. Rec. H2589, H2633-34 (1996) (statement of Rep. Smith). And as explained above (*supra*, at 6-8), it is clear that the Bush administration provided asylum relief to spouses.

That Congress took this approach is hardly surprising: in reality, there can be no doubt that *both* spouses are victimized when a pregnancy is forcibly aborted or a spouse is sterilized. Affirming *C-Y-Z-*, the BIA explained why that is so:

> A forced abortion imposed on a married couple naturally and predictably has a profound im-

> pact on both parties to the marriage. Although a forced abortion does not entirely end a couple's procreative potential, the forced abortion, like sterilization, deprives a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them. A husband also suffers emotional and sympathetic harm arising from his spouse's mistreatment and the infringement on their shared reproductive rights. Local [Chinese] Government officials understand this when they force a married couple to abort their prospective child. We find that such Government action is explicitly directed against both husband and wife for violation of the Government-imposed family planning law and amounts to persecution of both parties to the marriage.

In re S-L-L-, 24 I. & N. Dec. 1 (BIA 2006) (citations omitted).

It is telling that all the courts of appeal – except the Second Circuit – to have considered the question agree that spouses are victimized by China's coercive family planning policy and therefore are eligible for asylum under Section 601. See, *e.g.*, *Sun Wen Chen*, 491 F.3d at 108 (3d Cir. 2007) ("[F]orced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse. * * * And persecution of one spouse can be one of the most potent and cruel ways of hurting the other spouse * * *."); *Zhang*, 434 F.3d at 1001 (7th Cir. 2006) ("Although his wife was certainly a very direct victim of China's population control measures, Zhang was a victim as well. The forcible abortion has deprived him of his unborn child, of the ability to

realize the family that his wife and he had desired, and forever deprived him of the ability to become a parent to that unborn son or daughter with his wife."). See also *Shi Liang Lin*, 494 F.3d at 330 (Sotomayor, J., concurring) ("[A] desired pregnancy in a country with a coercive population control program necessarily requires both spouses to occur * * *. The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child."). Because spouses similarly suffer the profound effects of forced abortion and sterilization, they should be eligible for per se asylum.

Congress, furthermore, has done nothing to overturn the decade-old view that IIRIRA covers spouses. In this context, where the high-profile issues of abortion, immigration, and Chinese family-planning policy intersect, and congressional oversight is ever-present, it is appropriate to "ascribe meaning to the absence of congressional response to administrative and judicial interpretations of a statute." *Shi Liang Lin*, 494 F.3d at 323 (Katzmann, J., concurring). In fact, as we note above (*supra*, at 18), Congress implicitly affirmed the protection for spouses recognized by courts when it removed the 1000-person annual cap that had limited the number of individuals annually admitted pursuant to Section 601. Thus, it is clear that asylum protection should extend to spouses of victims of forced abortion or sterilization.

2. In extending asylum to victims of coercive population control policies, courts should not distinguish between couples who have traditional marriages and those who have formally registered their marriages.

a. Once it is recognized that spouses generally are protected by Section 601, it is plain that the Eleventh Circuit erred in holding that traditionally married spouses who have not formally registered their marriages are ineligible for asylum. Culturally, socially, and functionally, "traditional marriage" and "legally sanctioned marriage" are indistinguishable. In rural areas, *all* married couples perform traditional marriage ceremonies where a wife is symbolically transferred into the family of the husband. Engel, *supra*, at 959. These marriages entail an emotional bond and commitment fully equivalent to that of marriages registered with civil authorities. Indeed, registration with civil authorities is the *sole* difference between what the courts have termed "traditional marriage" and what is considered "legally recognized marriage."

Traditional marriage is common throughout China. The Chinese government itself acknowledges the prevalence of traditional, unregistered marriages, particularly in rural areas where the government estimates that such marriages make up approximately sixty to seventy percent of *all* marriages. Cent. People's Gov. of the People's Republic of China, What Are De Facto Marriages? (June 13, 2005), http://www.gov.cn/banshi/2005-06/13/content_6147.htm (citing Hu Kangsheng & Wang Shengming, *Interpretation of the Marriage Laws of the People's Republic of China* 27-29 (2001)) [hereinafter "De Facto Marriages"]. Private studies suggest that un-

registered, traditional marriages actually account for an even greater percentage of marriages. See Weiguo Zhang, *Dynamics of Marriage Change in Chinese Rural Society in Transition: A Study of a Northern Chinese Village*, 54 Population Studies 57, 66 (2000) (traditional marriages account for as high as ninety percent of rural marriages); Michael Palmer, *The Reemergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction*, 141 The China Quarterly 110, 118-19 (1995) (documenting that traditional marriages account for eighty percent of all marriages in some rural areas).

Traditionally married spouses are often unable to register their marriages because of the stringent marriage age requirements imposed by China's coercive population control laws. Here, petitioner was precluded from registering his marriage because he was twenty and his wife was seventeen. App., *infra*, at 2a. Such stringent age restrictions account for most unregistered traditional marriages within China. Weiguo Zhang, *supra*, at 66.

The Chinese government, furthermore, acknowledges that traditional marriage is widely treated as a husband-and-wife relationship in Chinese society. De Facto Marriages, *supra*. Traditionally married spouses cohabitate, hold themselves out to family and friends as a married couple, often have or attempt to have children, and frequently attempt to register their marriages, only to be turned aside by Chinese authorities.

Insofar as forced abortion and sterilization amount to persecution of male spouses who suffer the resulting emotional pain and loss, these considerations are fully applicable to traditional spouses. Given this reality, as well as the practical equiva-

lence of the two forms of marriage in virtually every other respect, it is arbitrary to distinguish between traditionally married spouses and registered spouses in determining the level of harm caused by forced abortion or sterilization.

b. In addition to being arbitrary, the Eleventh Circuit's decision – which denies protection to traditionally married spouses precluded from registering their marriages due to age restrictions – contravenes the congressional purpose underlying Section 601. Because Section 601 was specifically intended to guard *against* coercive population control policies, it would defeat the purpose of the statute to deny asylum to spouses who are unable to register their marriages simply because they do not meet stringent age requirements established as part of those policies.

Indeed, the Seventh and Ninth Circuits have highlighted the perversity of denying asylum protection to traditionally-married spouses who were unable to register their marriages. In *Zhang*, the Seventh Circuit determined that denying asylum to spouses who were prevented from marrying under Chinese law presented "a Catch-22." The Court explained:

> Zhang's asylum claim is based on China's enforcement of its population control policy, part of which includes a minimum age requirement for marriages, and a minimum age for having children. The forcible abortion in this case occurred precisely because Zhang and his wife married and became pregnant prior to those minimum ages. The marriage is not legal in China because of the population control policy.

Zhang, 434 F.3d at 999. The Seventh Circuit reasoned that to accept the IJ's holding in that case, which had "denied the claim precisely because that population control policy rendered the marriage illegal," would "entirely subvert [Section 601]." *Ibid.*

Similarly, in *Ma* v. *Ashcroft*, the Ninth Circuit held:

> The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and persecutory, contravenes the statute and leads to absurd and wholly unacceptable results.

361 F.3d at 559. These conclusions, premised on the plain language and clear purpose of the statute, were correct.[5]

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[5] Although the BIA rejected Yang's claim below, the decision was unpublished and is not entitled to deference. See *Perez-Enriquez* v. *Gonzales*, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944)). And the BIA previously, and properly, has held that a traditionally married spouse is persecuted when his wife is subjected to a forced abortion or sterilization. Indeed, *C-Y-Z-* itself involved a traditional marriage: the petitioner was traditionally married in 1986, but he and his wife did not register their marriage until 1991. *Matter of C-Y-Z-*, 21 I. & N. Dec. at 915-916 & n.1. Nonetheless, the BIA found that the petitioner was persecuted between 1986 and 1991 due to the forced sterilization of his wife; the fact that petitioner was a traditionally married spouse did not lessen the persecution. *Ibid.* See also *Ma*, 361 F.3d at 559 n.8 ("[T]he male petitioner [in *C-Y-Z-*] entered into a marriage deemed illegal by the Chinese government because one or both of the spouses were underage.").

D. The Attorney General's Proceeding In *Shi* Should Not Prompt This Court To Deny Review To Petitioner.

The Attorney General is currently reviewing *Shi*, which raises the issue whether spouses should be eligible for asylum under Section 601. Nevertheless, the Court should grant certiorari to resolve the question at issue in petitioner's case. In the alternative, the Court should hold this case pending the Attorney General's decision in *Shi*.

If the Attorney General affirms the BIA's recognition that asylum should be extended to spouses, a circuit split on the issue will persist given the position of the en banc Second Circuit, which has held that "the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief, only based on persecution that they themselves suffer." *Shi Liang Lin*, 494 F.3d at 308. There accordingly is no prospect that the Second Circuit will defer to a contrary administrative conclusion.

On the other hand, if the Attorney General decides that spouses should not be deemed entitled to asylum, a circuit split will persist given the positions taken by the Seventh and Ninth Circuits. These courts conducted their own statutory analysis – interpreting the language and reviewing the purpose of Section 601 – when extending per se asylum eligibility to spouses and rejecting contrary administrative determinations by granting asylum to traditionally married spouses. See, *e.g.*, *Ma*, 361 F.3d at 559 ("The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and persecu-

tory, contravenes the statute and leads to absurd and wholly unacceptable results. Accordingly, we need not defer to the BIA's decision."). This independence and pattern of rejection of administrative determinations indicates that these circuits will not reconsider their views based on the Attorney General's decision.

If the Court determines not to grant the petition, however, it should defer disposition of the petition until the Attorney General renders his decision. To do otherwise would create a grave inequity for the petitioner based solely on the timing of his case. If the Attorney General had commenced his proceeding a year from now, petitioner's current request for review would be considered by this Court unencumbered by the pendency of the administrative review; had the proceeding started during petitioner's appeal in the Eleventh Circuit, he could have sought appropriate relief in that court; and had the Attorney General's proceeding concluded within the period in which the petitioner could seek relief from this Court, petitioner could have asked the Court to vacate the Eleventh Circuit's decision and remand the case for reconsideration in light of a favorable ruling by the Attorney General.

As it happened, however, the Attorney General did not begin the *Shi* proceeding until after the disposition of petitioner's case in the Eleventh Circuit, and that proceeding will not end until petitioner's time for petitioning this Court has expired. This accident of timing should not result in the denial of relief to petitioner and his return to the country where he suffered persecution. As a consequence, if the Court does not grant review, it should defer disposition of the petition pending resolution of *Shi*. In the alternative, the Court should remand to the court be-

low with instructions to stay the case pending the Attorney General's resolution of *Shi*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold the case pending the outcome of the Attorney General's proceeding in *Matter of Jianzhong Shi*.

Respectfully submitted.

BRETT DIGNAM
SARAH F. RUSSELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Thomas V. Massucci
401 Broadway, Suite 908
New York, NY 10013
(212) 334-2280

Counsel for Petitioner

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